EDWARD G. ARBERRY
NAME
E-77487, 14-D6-L
PRISON NUMBER
P.O.BOX 4000, California State Prison Solano
CURRENT ADDRESS OR PLACE OF CONFINEMENT
Vacaville, California 95696-4000
CITY, STATE, ZIP CODE

2254 ✓ 1983
FILING FEE PAID
Yes ___ No ✓
IFP MOTION FILED
Yes ✓ No ___
COPIES SENT TO
Court ___ ✓ ProSe ___

FILED
APR - 9 2008
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY ___ DEPUTY

# UNITED STATES DISTRICT COURT
## SOUTHERN DISTRICT OF CALIFORNIA

EDWARD G. ARBERRY,
(FULL NAME OF PETITIONER)
PETITIONER

v.

D.K. SISTO, Warden,
(NAME OF WARDEN, SUPERINTENDENT, JAILOR, OR AUTHORIZED PERSON HAVING CUSTODY OF PETITIONER [E.G., DIRECTOR OF THE CALIFORNIA DEPARTMENT OF CORRECTIONS])
RESPONDENT

and

JERRY BROWN,
The Attorney General of the State of California, Additional Respondent.

Civil No '08 CV 0649 J POR
(TO BE FILLED IN BY CLERK OF U.S. DISTRICT COURT)

PETITION FOR WRIT OF HABEAS CORPUS

UNDER 28 U.S.C. § 2254
BY A PERSON IN STATE CUSTODY

1. Name and location of the court that entered the judgment of conviction under attack: Superior Court of California, County of San Diego
2. Date of judgment of conviction: March 23, 2001
3. Trial court case number of the judgment of conviction being challenged: SCD 145070
4. Length of sentence: Twelve long years (12) yrs.

5. Sentence start date and projected release date: From date of arrest, until the year of 2010.

6. Offense(s) for which you were convicted or pleaded guilty (all counts): Health and Safety Code §§11351.5, 11352(a), Penal Code §667.5.

7. What was your plea? (CHECK ONE)
   - (a) Not guilty ☒
   - (b) Guilty ☐
   - (c) Nolo contendere ☐

8. If you pleaded not guilty, what kind of trial did you have? (CHECK ONE)
   - (a) Jury ☒
   - (b) Judge only ☐

9. Did you testify at the trial?
   ☐ Yes ☒ No

## DIRECT APPEAL

10. Did you appeal from the judgment of conviction in the **California Court of Appeal**?
    ☒ Yes ☐ No

11. If you appealed in the **California Court of Appeal**, answer the following:
    - (a) Result: denied
    - (b) Date of result (if known): November 26, 2001
    - (c) Case number and citation (if known): D038005
    - (d) Names of Judges participating in case (if known) Superior Court Judge B.E.Revak Appellant Judges O'ROURKE,J., KREMER,P.J., HUFFMAN, J.
    - (e) Grounds raised on direct appeal: Unable to fit all grounds on the space given. See Case No.D038005; 1. Jury nullification is implicit in the Sixth Amendment.

12. If you sought further direct review of the decision on appeal by the **California Supreme Court** (e.g., a Petition for Review), please answer the following:
    - (a) Result: Not applicable
    - (b) Date of result (if known): N/A
    - (c) Case number and citation (if known): N/A
    - (d) Grounds raised: N/A
      N/A

13. If you filed a petition for certiorari in the **United States Supreme Court**, please answer the following with respect to that petition:

(a) Result: Not applicable.

(b) Date of result (if known): N/A

(c) Case number and citation (if known): N/A

N/A

(d) Grounds raised: Not applicable.

" "

" "

" "

## COLLATERAL REVIEW IN STATE COURT

14. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions (e.g., a Petition for Writ of Habeas Corpus) with respect to this judgment in the **California Superior Court**?

☒ Yes ☐ No

15. If your answer to #14 was "Yes," give the following information:

(a) **California Superior Court** Case Number (if known): HC 18846

(b) Nature of proceeding: Petition for writ of habeas corpus.

(c) Grounds raised: See body of present submitted petition.

" "

" "

" "

(d) Did you receive an evidentiary hearing on your petition, application or motion?

☐ Yes ☒ No

(e) Result: denied.

(f) Date of result (if known): April 24, 2007, and July 16, 2007.

16. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions (e.g., a Petition for Writ of Habeas Corpus) with respect to this judgment in the **California Court of Appeal**?

☐ Yes ☒ No

17. If your answer to #16 was "Yes," give the following information:

(a) **California Court of Appeal** Case Number (if known): D051478

(b) Nature of proceeding: writ of habeas corpus

(c) Names of Judges participating in case (if known) McINTYRE, Acting P.J.

(d) Grounds raised: Same as in the present submitted petition.
" "
" "

(e) Did you receive an evidentiary hearing on your petition, application or motion?
☐ Yes ☒ No

(f) Result: denied.

(g) Date of result (if known): August 30, 2007

18. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions (e.g., a Petition for Writ of Habeas Corpus) with respect to this judgment in the **California Supreme Court**?
☒ Yes ☐ No

19. If your answer to #18 was "Yes," give the following information:

(a) **California Supreme Court** Case Number (if known): S156396

(b) Nature of proceeding: writ of habeas corpus

(c) Grounds raised: same as in the present submitted petition.
" "
" "
" "
" "

(d) Did you receive an evidentiary hearing on your petition, application or motion?

☐ Yes ☒ No

(e) Result: denied.

(f) Date of result (if known): March 19, 2008

20. If you did ***not*** file a petition, application or motion (e.g., a Petition for Review or a Petition for Writ of Habeas Corpus) with the **California Supreme Court**, containing the grounds raised in this federal Petition, explain briefly why you did not:

Not applicable, petitioner has properly exhausted his petition in every state court without an evidentiary hearing.

## COLLATERAL REVIEW IN FEDERAL COURT

21. Is this your **first** federal petition for writ of habeas corpus challenging this conviction?

XX Yes ☐ No (IF "YES" SKIP TO #22)

(a) If no, in what federal court was the prior action filed? Not applicable.

(i) What was the prior case number? N/A

(ii) Was the prior action (CHECK ONE):

☐ Denied on the merits? N/A

☐ Dismissed for procedural reasons? Not applicable.

(iii) Date of decision: N/A

(b) Were any of the issues in this current petition also raised in the prior federal petition?

☐ Yes ☐ No N/A

(c) If the prior case was denied on the merits, has the Ninth Circuit Court of Appeals given you permission to file this second or successive petition?

☐ Yes ☐ No Not applicable.

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**CAUTION:**

- **Exhaustion of State Court Remedies:** In order to proceed in federal court you must ordinarily first exhaust your state court remedies as to each ground on which you request action by the federal court. This means that even if you have exhausted some grounds by raising them before the California Supreme Court, you must first present ***all*** other grounds to the California Supreme Court before raising them in your federal Petition.
- **Single Petition:** If you fail to set forth all grounds in this Petition challenging a specific judgment, you may be barred from presenting additional grounds challenging the same judgment at a later date.
- **Factual Specificity:** You must state facts, not conclusions, in support of your grounds. For example, if you are claiming incompetence of counsel you must state facts specifically setting forth what your attorney did or failed to do. A rule of thumb to follow is — state who did exactly what to violate your federal constitutional rights at what time or place.

---

## GROUNDS FOR RELIEF

22. **State *concisely* every ground on which you claim that you are being held in violation of the constitution, law or treaties of the United States. Summarize *briefly* the facts supporting each ground.** (e.g. what happened during the state proceedings that you contend resulted in a violation of the constitution, law or treaties of the United States.) If necessary, you may attach pages stating additional grounds and/or facts supporting each ground.

(a) **GROUND ONE**: PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AS PROVIDED UNDER THE SIXTH AMENDMENT DURING SENTENCING IN VIOLATION OF DUE PROCESS, FOURTEENTH AMENDMENT.

**Supporting FACTS**: Petitioner was sentenced on April 20, 2001, after a Jury Trial convicting petitioner of Health & Safety Code§§11351.5, 11352, and the Court having found true two prior prison terms, petitioner was then sentenced in excess of the statutory maximum. The court imposed a aggravated sentence of (5) years, then doubled the sentenced to ten, for possession of cocaine base for sale, the Court then stayed the imposition of sentenced pursuant to Penal Code§654. Plus one year for each of the two remaining prison priors, for a total term of 12 years. Trial Counsel failed his duty to investigate and object to an earlier ruling by the United States Supreme Court in Apprendi vs. New Jersey (2000), 530 U.S. 466 , 147 L.Ed 2d 435, 120 S.Ct 2348. That had been decided on June 26, 2000. That Apprendi was deprive of a Jury trial to determine the fact that exposes a defendant to a penalty exceeding the maximum which the defendants would receive if punished according to the facts reflected in the jury verdict alone, had trial counsel objected because Apprendi was decided before petitioner's case became final, and there was no tactical reason for not raising this meritorious claim before the court, had counsel objected to this unauthorized in excess of the statutory maximum the court would have been hard press to violate petitioner's due process rights, which would have preserve the claim for federal review.

**Did you raise GROUND ONE in the California Supreme Court?**

XX☐ Yes ☐ No.

If yes, answer the following:

(1) Nature of proceeding (i.e., petition for review, habeas petition): Habeas petition.

(2) Case number or citation: HC 18846

(3) Result (attach a copy of the court's opinion or order if available): denied

(b) **GROUND TWO**: PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL ON APPEAL IN VIOLATION OF THE SIXTH AMENDMENT OF THE UNTIED STATES CONSTITUTION, IN ADDITION PETITIONER WAS DENIED DUE PROCESS TO APPELLATE COUNSEL'S ERRORS.

**Supporting FACTS**: On April 20, 2001, petitioner was sentence to an excess of an un-authorized sentence of the prescribe statutory maximum. Petitioner was sentence to an aggravated high term without the Jury's determination as accure and or in Apprendi vs. New Jersey, 530 U.S. 466(2000); in violation of petitioner's Sixth Amendment Right to counsel, and Due process to an unauthorized sentence, under the equal protection clause. Appellate Counsel was aware or should have been competent as to the U.S. Supreme ruling in Apprendi. That was decided approximatel (9) months before petitioner was found guilty by a jury. There could be no conceivable reason why this error of appellate counsel's failure to object to the sentence which was in excess of the court's juris-diction in violation of the Supreme Court's precedence, this omission of the claim error does not relieve appellate counsel's duty to argue an arguable claim to the appellate court. Thus appellate counsel forfeited petitioner's due process rights under the state and federal protection of the Fourteenth amendment right to appellate counsel.

**Did you raise GROUND TWO in the California Supreme Court?**

☒ Yes ☐ No.

If yes, answer the following:

(1) Nature of proceeding (i.e., petition for review, habeas petition): habeas corpus

(2) Case number or citation: HC 18846

(3) Result (attach a copy of the court's opinion or order if available): denied

(c) **GROUND THREE**: DUE PROCESS VIOLATION UNAUTHORIZED SENTENCE.

Supporting FACTS: The court in its April 24, 2007, denial of habeas petition #HC18846, (first petition), question whether it petitioner brings a Ineffective assistance claim would entitle petitioner relied upon in, In Re Clark (1993) 5 Cal.4th 750, 765, in the exception to any default claim as pertaining to a sentence, miscarriage of justice and or actual innocence as stated by our California Supreme Court. Thus petitioner believed that this court has authority to either order an Order to Show Cause, or an evidentiary hearing into this matter. Furthermore petitioner request that the court review Linletter v. Walker (U.S. La 1965), at common law there was no authority for the proposition that judicial decisions made law only for future.

Blackstone stated that the rule that the duty of the court was not to "pronounced a new law but to maintain and expound [381 U.S. 623] the old one.' 1 Blackstone commentaries (69 15 ed 1809). This court followed that rule in Norton v. Shelby County, 118 U.S. 425, 6 S. Ct 1121, 30 L.Ed 178 (1886) holding that unconstitutional action 'confers no rights it imposes no duties; it affords no protection; it creates office, it is; in legal contemplation, as inoperative as thought it had never passed.' At 442, 6 S Ct pp.1125. Under our cases it appears (1) That a chance in law will be given effect while a case is on direct review, United States v. Schooner Peggy, 1 Cranch 103, 2 L.ed 49 (1801) supra, and (2) that the effect of the subsequent ruling of invalidity on prior final judgments when collaterally attached is subject to no set "principle of absolute retroactive invalidity" but depends upon a consideration of "particular relations and particular conduct of rights claimed to have become vested, of status, of prior determination.

**Did you raise GROUND THREE in the California Supreme Court?**

X☒ Yes ☐ No.

If yes, answer the following:

(1) Nature of proceeding (i.e., petition for review, habeas petition): habeas petition.

(2) Case number or citation: HC18846

(3) Result (attach a copy of the court's opinion or order if available): denied.

(d) **GROUND FOUR**: THE HABEAS CORPUS DENIAL OF PETITIONER'S SECOND PETITION IS A DENIAL OF DUE PROCESS WHEN IT IDENTIFIED THE GOVERNING LEGAL PRINCIPLE BUT UNREASONABLY APPLIES IT TO THE FACTS OF THE PARTICULAR CASE.

Supporting FACTS: The habeas court denial of petitioner's (second petition.) In his dissent, Justice Stevens (joined by Justice Scalia, the author of Blakley, and Justice Souter) explained: "To be clear, our holding...does not established the 'impermissibility of judicial factfinding.' [Citation.] Instead, judicial factfinding to support an offense level determination or an enhancement is only unconstitutional when that finding raises the sentence beyond the sentence that could have been lawfully imposed by reference to facts found by the jury or admitted by the defendant." Thus petitioner was deprived of the effective assistance of counsel at trial, when counsel acquiesce his duty by failing to object to an enhancement in which the court failed to rely on any aggravating circumstances, the habeas corpus court ruling was contrary to, a state court's decision is an "unreasonable application" of Supreme Court law if "the state court correctly identifies the governing legal principle..but unreasonably applies it to the facts of the particular case." In addition to trial court counsel's performance appellate counsel failed her client by not bringing to light the Apprendi decision. When she reviewed the sentencing transcripts that their was an absence of any aggravating factors to support the sentencing courts unauthorize sentence. The habeas corpus court also failed to acknowledged that an unauthorized sentence can be challenge at any time, because an unauthorize sentence does not ripen into a legal sentence in violation of due process. Petitioner did not admit to an aggravating factor nor was any factual determination presented to a jury to require the prosecution to prove beyond a reasonable doubt to authorize the court to exceed its authority. I request an evidentiary hearing, and appointment of counsel in the interest of justice.

**Did you raise GROUND FOUR in the California Supreme Court?**

☒ Yes ☐ No.

If yes, answer the following:

(1) Nature of proceeding (i.e., petition for review, habeas petition): HABEAS PETITION

(2) Case number or citation: HC18846

(3) Result (attach a copy of the court's opinion or order if available): attached.

**23.** Do you have any petition or appeal **now pending** in any court, either state or federal, pertaining to the judgment under attack?
☐ Yes ☒ No

**24.** If your answer to #23 is "Yes," give the following information:

(a) Name of Court: Not applicable.

(b) Case Number: " "

(c) Date action filed: " "

(d) Nature of proceeding: " "
" "

(e) Name(s) of judges (if known): Not applicable
" "

(f) Grounds raised:
Not applicable.
" "
" "
" "

(g) Did you receive an evidentiary hearing on your petition, application or motion?
☐ Yes ☐ No N/A

**25.** Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing: J.W. Carver, 1010 2nd Ave, #2300, San Diego, CA 92101

(b) At arraignment and plea: same as above.

(c) At trial: same as above.

(d) At sentencing: same as above.

(e) On appeal: Elizabeth A. Missakian, 110 W, "C", suite 2108, San Diego,CA

(f) In any post-conviction proceeding: Not applicable.
" "

(g) On appeal from any adverse ruling in a post-conviction proceeding:
Not applicable.

**26.** Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?
☐ Yes ☒ No

**27.** Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?
☐ Yes ☒ No

(a) If so, give name and location of court that imposed sentence to be served in the future:
Not applicable.

(b) Give date and length of the future sentence: Not applicable

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future? Not applicable.
☐ Yes ☐ No N/A

**28.** Consent to Magistrate Judge Jurisdiction

In order to insure the just, speedy and inexpensive determination of Section 2254 habeas cases filed in this district, the parties may waive their right to procced before a district judge and consent to magistrate judge jurisdiction. Upon consent of all the parties under 28 U.S.C. § 636(c) to such jurisdiction, the magistrate judge will conduct all proceedings including the entry of final judgment. The parties are free to withhold consent without adverse substantive consequences.

The Court encourages parties to consent to a magistrate judge as it will likely result in an earlier resolution of this matter. If you request that a district judge be designated to decide dispositive matters, a magistrate judge will nevertheless hear and decide all non-dispositive matters and will hear and issue a recommendation to the district judge as to all dispositive matters.

You may consent to have a magistrate judge conduct any and all further proceedings in this case, including the entry of final judgment, by indicating your consent below.

Choose only one of the following:

☒ XX Plaintiff consents to magistrate judge jurisdiction as set forth above.

**OR**

☐ Plaintiff requests that a district judge be designated to decide dispositive matters and trial in this case.

**29.** Date you are mailing (or handing to a correctional officer) this Petition to this court: April ,2008

Wherefore, Petitioner prays that the Court grant Petitioner relief to which he may be entitled in this proceeding.

______________________________
SIGNATURE OF ATTORNEY (IF ANY)

I declare under penalty of perjury that the foregoing is true and correct. Executed on

4-8-08 Edward G. Arberry Edward Arberry

(DATE) SIGNATURE OF PETITIONER

**EXHIBIT ABSTRACT OF JUDGMENT**

**ABSTRACT OF JUDGMENT – PRISON COMMITMENT – DETERMINATE**
***[NOT VALID WITHOUT COMPLETED PAGE TWO OF CR-290 ATTACHED]***

~~0061~~ 0140 CR-290

SUPERIOR COURT OF CALIFORNIA, COUNTY OF San Diego
MUNICIPAL • BRANCH OR JUDICIAL DISTRICT

FILED
Clerk of the Superior Court
APR 2 4 2001
BY: D. SIMS

PEOPLE OF THE STATE OF CALIFORNIA vs.
DEFENDANT: ELWOOD ARBERRY DOB: 02-17-01
EDWARD ARBERRY
06565916
BOOKING #: 01105181A

SC145070 -A
-B
-C
-D

☐ NOT PRESENT

COMMITMENT TO STATE PRISON
ABSTRACT OF JUDGMENT

☐ AMENDED ABSTRACT

| DATE OF HEARING | DEPT. NO. | JUDGE |
|---|---|---|
| 04-20-01 | 47 | BERNARD E. REVAK |

| CLERK | REPORTER | PROBATION NO. OR PROBATION OFFICER |
|---|---|---|
| D. SIMS | KIM MORALES | A000587014 |

COUNSEL FOR PEOPLE: DAMON MOSLER
COUNSEL FOR DEFENDANT: J. CARVER ☒ APPTD.

1. Defendant was convicted of the commission of the following felonies:
☐ Additional counts are listed on attachment
___ (number of pages attached)

| CODE | SECTION NO. | CRIME | YEAR CRIME COMMITTED | DATE OF CONVICTION (MO./DATE/YEAR) | CONVICTED BY: JURY | COURT | PLEA | TERM (L, M, U) | CONCURRENT | CONSECUTIVE 1/3 VIOLENT | CONSECUTIVE 1/3 NON-VIOLENT | CONSECUTIVE FULL TERM | INCOMPLETE SENTENCE | 654 STAY | PRINCIPAL OR CONSECUTIVE TIME IMPOSED YRS. | MOS. |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| HS | 11352(a) | Sale of cocaine base | 00 | 03-23-01 | J | | | U | | | | | | | 10 | 0 |
| HS | 11351.5 | Poss/purchase cocaine base | 00 | 03-23-01 | J | | | U | | | | | | X | | |
| | | | | | | | | | | | | | | | | |
| | | | | | | | | | | | | | | | | |
| | | | | | | | | | | | | | | | | |
| | | | | | | | | | | | | | | | | |

2. ENHANCEMENTS charged and found to be true TIED TO SPECIFIC COUNTS (mainly in the PC 12022 series). List each count enhancement horizontally. Enter time imposed for each or "S" for stayed. DO NOT LIST enhancements stricken under PC 1385.

| ENHANCEMENT | Y/S | ENHANCEMENT | Y/S | ENHANCEMENT | Y/S | ENHANCEMENT | Y/S | TOTAL | |
|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | | | |
| | | | | | | | | | |
| | | | | | | | | | |
| | | | | | | | | | |
| | | | | | | | | | |
| | | | | | | | | | |

3. ENHANCEMENTS charged and found to be true FOR PRIOR CONVICTION OR PRISON TERMS (mainly in the PC 667 series). List all enhancements horizontally. Enter time imposed for each or "S" for stayed. DO NOT LIST enhancements stricken under PC 1385.

| ENHANCEMENT | Y/S | ENHANCEMENT | Y/S | ENHANCEMENT | Y/S | ENHANCEMENT | Y/S | TOTAL | |
|---|---|---|---|---|---|---|---|---|---|
| 5(b) | 1 | PC667.5(b) | 1 | | | | | 2 | 0 |
| | | | | | | | | | |
| | | | | | | | | | |
| | | | | | | | | | |

4. ☐ Defendant was sentenced pursuant to PC 667 (b)-(i) or PC 1170.12 (two-strikes).

5. INCOMPLETED SENTENCE(S) CONSECUTIVE

| COUNTY | CASE NUMBER |
|---|---|
| | |
| | |
| | |

6. TOTAL TIME ON ATTACHED PAGES:

7. ☐ Additional indeterminate term (see CR-292).

8. TOTAL TIME: 12 | 0

* This form is prescribed under PC 1213.5 to satisfy the requirements of PC 1213 for determinate sentences. Attachments may be used but must be referred to in this document.

(Continued on reverse)

| PEOPLE OF THE STATE OF CALIFORNIA vs. DEFENDANT: ELWOOD ARBERRY | | 0141 ~~0065~~ | |
|---|---|---|---|
| SCD145070 -A | -B | -C | -D |

FINANCIAL OBLIGATIONS (including any applicable penalty assessments):

a. RESTITUTION FINE of: $2,400. per PC 1202.4(b) forthwith per PC 2085.5.
b. RESTITUTION FINE of: $2,400. per PC 1202.45 suspended unless parole is revoked.
c. RESTITUTION of: $. per PC 1202.4(f) to ☐ victim(s)* ☐ Restitution Fund
(*List victim name(s) if known and amount breakdown in item 11, below.)
(1) ☐ Amount to be determined.
(2) ☐ Interest rate of: __% (not to exceed 10% per PC 1202.4(f)(3)(F)).
d. ☐ LAB FEE of: $____ for counts: ______ per H&SC 11372.5(a).
e. ☐ DRUG PROGRAM FEE of $150 per H&SC 11372.7(a).
f. ☐ FINE of $___ per PC 1202.5.

TESTING

a. ☐ AIDS pursuant to ☐ PC 1202.1 ☐ other *(specify)*:
b. ☐ DNA pursuant to ☐ PC 290.2 ☐ other *(specify)*:

Other orders *(specify)*:
**Ct recommends drug counseling at correctional facility**

Execution of sentence imposed

a. ☒ at initial sentencing hearing.
b. ☐ at resentencing per decision on appeal.
c. ☐ after revocation of probation.
d. ☐ at resentencing per recall of commitment. (PC 1170(d).)
e. ☐ other *(specify)*:

CREDIT FOR TIME SERVED

| CASE NUMBER | TOTAL CREDITS | ACTUAL | LOCAL CONDUCT | |
|---|---|---|---|---|
| SCD145070 -A | 132 | 88 | 44 | ☒ 4019 ☐ 2933.1 |
| -B | | | | ☐ 4019 ☐ 2933.1 |
| -C | | | | ☐ 4019 ☐ 2933.1 |
| -D | | | | ☐ 4019 ☐ 2933.1 |

| DATE SENTENCE PRONOUNCED: | SERVED TIME IN STATE INSTITUTION: | | |
|---|---|---|---|
| 04-20-01 | ☐ DMH | ☐ CDC | ☐ CRC |

The defendant is remanded to the custody of the sheriff ☒ forthwith ☐ after 48 hours excluding Saturdays, Sundays, and holidays.

To be delivered to ☒ the reception center designated by the director of the California Department of Corrections.
☐ other *(specify)*: _____

CLERK OF THE COURT

I hereby certify the foregoing to be a correct abstract of the judgment made in this action.

| DEPUTY'S SIGNATURE | DATE |
|---|---|
| D. Sims (signature) | 04-20-01 |

SUPERIOR COURT CASE NO. SCD 145070

SUPERIOR COURT HABEAS CORPUS, No HC18846

[HABEAS CORPUS OPINION, ATTACHED.]

[COURT OF APPEAL-FOURTH APPELLATE DISTRICT, DENIAL ORDER 8-30-2007]
[ATTACHED.]

COURT OF APPEAL - FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

FILED
Stephen M. Kelly, Clerk
AUG 30 2007
Court of Appeal Fourth District

| | |
|---|---|
| In re EDWARD G. ARBERRY<br><br>on<br><br>Habeas Corpus. | D051478<br><br>(San Diego County Super. Ct. Nos. SCD 145070, HC 18846) |

THE COURT:

The petition for writ of habeas corpus has been read and considered by Justices Haller, McIntyre, and O'Rourke. Petitioner contends his sentence violates the United States Supreme Court's decision in *Blakely v. Washington* (2004) 542 U.S. 296, as applied to California's sentencing scheme by *Cunningham v. California* (2007) 549 U.S. ___, 127 S. Ct. 856, 871. However, the *Blakely* decision does not apply retroactively to cases, such as petitioner's, that are final or are before the court on collateral review. (*In re Consiglio* (2005) 128 Cal.App.4th 511, 516; *Schardt v. Payne* (9th Cir. 2005) 414 F.3d 1025, 1036.) The petition is denied.

McINTYRE, Acting P. J.

Copies to: All parties

FILED
Clerk of the Superior Court

APR 2 4 2007

By: ELAINE SABLAN, Deputy

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN DIEGO

| | |
|---|---|
| IN THE MATTER OF THE APPLICATION OF:<br><br>EDWARD G. ARBERRY,<br><br>Petitioner | HC 18846<br>SCD 145070<br><br>ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS |

THIS COURT, HAVING READ THE PETITION FOR WRIT OF HABEAS CORPUS AND THE FILE IN THE ABOVE CAPTIONED MATTER, FINDS AS FOLLOWS:

On March 23, 2001, a jury convicted Petitioner of selling cocaine base (Health & Saf. Code § 11352(a)) and possessing cocaine base for sale (Health & Saf. Code § 11351.5). Petitioner admitted two prior "strike" convictions (Pen. Code §§ 667(b)-(i)/1170.12) and three prison priors (Pen. Code § 667.5(b)). On April 20, 2001, the court struck one strike prior and one prison prior and sentenced Petitioner to the upper term of five years for selling cocaine base, doubled to 10 years because of the remaining strike prior, plus one year for each of the two remaining prison priors, for a total term of 12 years in prison. The court stayed sentence on the possession of cocaine base for sale conviction (Pen. Code § 654).

///

In the instant petition for writ of habeas corpus, filed March 14, 2007, Petitioner argues that the court improperly imposed the upper term sentence, denying him his rights to due process and to a jury trial, pursuant to *Cunningham v. California* (2007) 549 U.S. __, 127 S.Ct. 856, 166 L.Ed.2d 856 (*Cunningham*).

In *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), the court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Apprendi, supra,* 530 U.S. at 490.) In *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*), the court held that, for *Apprendi* purposes, the "statutory maximum" is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. (*Blakely, supra,* 542 U.S. at 303.) Finally, in *Cunningham*, the court held that, under California's Determinate Sentencing Law as it stood at the time of the court's decision, when three possible punishments were prescribed for an offense (the "lower," "middle" or "upper" terms), the middle term was the statutory maximum the judge could impose without finding additional facts. (*Cunningham, supra,* 127 S.Ct. at 868.) Therefore, any imposition of the upper term based on a court's determination of aggravating factors violated the defendant's right to a jury trial and to proof beyond a reasonable doubt. (*Id.* at 868-871.)

Petitioner's argument that his sentence is illegal cannot be based on *Blakely* or *Cunningham* because Petitioner's case was final[1] before those cases were decided. Accordingly, those cases do not apply retroactively to him. (See *People v. Monge* (1997) 16 Cal.4th 826, 841 [new rules of constitutional law do not generally apply retroactively to convictions already final]; *In re Consiglio* (2005) 128 Cal.App.4th 511, 514-515 [*Apprendi* and *Blakely* not retroactive to cases already final on direct review]; *People v. Amons* (2005) 125 Cal.App.4th 855, 865-867 [*Blakely* not retroactive because it does not establish a watershed rule of criminal procedure].)

At most, Petitioner could raise a claim under *Apprendi*, as that case was decided before Petitioner's case became final. As noted above, the court in *Apprendi* held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Apprendi*, *supra,* 530 U.S. at 490.) However, an *Apprendi*-based claim cannot be brought by habeas corpus by Petitioner because it could have been could have been and should have been raised in his appeal. (See *In re Clark* (1993) 5 Cal.4th 750, 765, citing *In re Dixon* (1953) 41 Cal.2d 756, 759 [matters that could have been but were not raised on appeal are not cognizable on habeas corpus in the absence of special circumstances].) Petitioner could, by habeas corpus, bring a claim of ineffective assistance of appellate counsel for failure to raise an *Apprendi* issue on appeal, but this court wonders whether such a claim would entitle Petitioner to relief, given the delay between Petitioner's conviction and the filing of any such claim (see *In re Robbins* (1998) 18 Cal.4th 770, 780-781), and the court's belief that the prevailing view of *Apprendi* at the time it was decided was that it did not apply to aggravating circumstances necessary to impose an upper term.

In any event, a claim of ineffective assistance of appellate counsel has not been presented to this court. Thus, it need not be decided. (See *People v. Duvall* (1995) 9 Cal.4th 464, 478 [issues not raised in the pleadings need not be addressed]; *Board of Prison Terms v. Superior Court* (2005) 130 Cal.App.4th 1212, 1236-1237 [court may not issue Order to Show Cause requiring response to claims not raised in the petition for writ of habeas corpus or supported by the factual allegations in the petition].) Should Petitioner, in the future, develop and present a claim of ineffective assistance of counsel based on the failure to raise an *Apprendi* issue on appeal and provide this court with a copy of the transcript of the sentencing hearing (see *People v. Duvall, supra,* 9 Cal.4th at 474 [a petition for writ of habeas corpus must state fully and with particularity the factual basis for the claims set forth therein and include copies of reasonably available documentary evidence supporting the claims]), this order will not foreclose review of that claim.

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1 See Court of Appeal, 4th App. Dist., Div. One, case no. D038005, remittitur issued February 21, 2002.

Based on the above, the petition is denied. Service of this Order is ordered upon (1) the San Diego Office of the District Attorney, Appellate Division and (2) Petitioner.

IT IS SO ORDERED.

DATED: 4/24/07

[signature]

DAVID J. DANIELSEN
JUDGE OF THE SUPERIOR COURT

EXHIBIT-[2nd H.C.#18846, DENIAL ORDER.]

JULY 16, 2007

**FILED**
San Diego Superior Court

JUL 16 2007

Clerk of the Superior Court
By M. Castorena

**IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**IN AND FOR THE COUNTY OF SAN DIEGO**

| | |
|---|---|
| IN THE MATTER OF THE APPLICATION OF:<br><br>EDWARD G. ARBERRY,<br><br>Petitioner | HC 18846 (2nd Petition)<br>SCD 145070<br><br>ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS |

THIS COURT, HAVING READ THE PETITION FOR WRIT OF HABEAS CORPUS AND THE FILE IN THE ABOVE CAPTIONED MATTER, FINDS AS FOLLOWS:

On March 23, 2001, a jury convicted Petitioner of selling cocaine base (Health & Saf. Code § 11352(a)) and possessing cocaine base for sale (Health & Saf. Code § 11351.5). Petitioner admitted two prior "strike" convictions (Pen. Code §§ 667(b)-(i)/1170.12) and three prison priors (Pen. Code § 667.5(b)). On April 20, 2001, the court struck one strike prior and one prison prior and sentenced Petitioner to the upper term of five years for selling cocaine base, doubled to 10 years because of the remaining strike prior, plus one year for each of the two remaining prison priors, for a total term of 12 years in prison. The court stayed sentence on the conviction for possession of cocaine base for sale (Pen. Code § 654).

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In this petition for writ of habeas corpus, filed May 23, 2007, Petitioner argues he received ineffective assistance of trial and appellate counsel because neither raised a claim of error based on *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) in his case. Petitioner's claims of ineffective assistance of counsel do not entitle him to any relief.

First, Petitioner's claims appear untimely, as they come five years after Petitioner's case became final.[1] Petitioner has not established that there has been an absence of delay, that there is good cause for the delay, or that his claims fall within an exception to the timeliness bar, as is his burden. (*In re Robbins* (1998) 18 Cal.4th 770, 780-781.) Petitioner is correct when he argues that some sentencing errors may be corrected at any time (see *In re Harris* (1993) 5 Cal.4th 813, 842 [the rule requiring a habeas corpus petitioner to justify any substantial delay in raising a claim is inapplicable to a claim of sentencing error amounting to an excess of jurisdiction]), but Petitioner's claim is not of sentencing error per se. It is that he received ineffective assistance of counsel.

In any event, Petitioner's claims also fail on the merits. Whether Petitioner was denied effective assistance of counsel is a two prong test. (*Strickland v. Washington* (1984) 466 U.S. 668, 687 (*Strickland*); *People v. Ledesma* (1987) 43 Cal.3d 171, 216 (*Ledesma*).) First, Petitioner must show that counsel's representation was deficient, in that it "fell below an objective standard of reasonableness . . . under prevailing professional norms." (*Strickland, supra*, 466 U.S. at 688; *Ledesma, supra*, 43 Cal.3d at 216.) This first prong is reviewed under a standard of deferential scrutiny. (*Strickland, supra*, 466 U.S. at 689; *Ledesma, supra*, 43 Cal.3d at 216.) Counsel is given the benefit of a strong presumption that his or her conduct fell within the "wide range of reasonable professional assistance." (*Strickland, supra,* 466 U.S. at 689.) "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." (*Strickland, supra,* 466 U.S. at 689; *In re Marquez* (1992) 1 Cal.4th 584, 603.)

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1 The court is informed and believes that the California Supreme Court denied Petitioner's petition for review on February 13, 2002 (see California Supreme Court case no. S103230), and there is no indication Petitioner filed a

Second, if counsel's performance is shown to be deficient, the Petitioner must show that the deficient performance prejudiced his defense. (*Strickland, supra*, 466 U.S. at 687; *Ledesma, supra*, 43 Cal.3d at 217.) Generally, this prong must be "affirmatively proved." (*Ledesma, supra*, 43 Cal.3d at 217.) To prove prejudice, a Petitioner cannot merely show that the errors had some conceivable effect on the outcome of the proceeding. (*Ledesma, supra*, 43 Cal.3d at 217.) Instead, Petitioner must establish that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would be different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland, supra*, 466 U.S. at 693-694; *Ledesma, supra*, 43 Cal.3d at 217-218.) A court need not determine whether counsel's performance was deficient if the ineffectiveness claim can be disposed of on the ground of lack of sufficient prejudice. (*Strickland, supra*, 466 U.S. at 697.)

Petitioner provides the court with no authority, and the court could find none, suggesting that a failure to raise an *Apprendi* issue in the trial court or on appeal in 2001 or 2002 fell below professional standards applicable at the time. In addition, Petitioner has not affirmatively proved his case was prejudiced. He provides the court with no authority, and the court could find none, suggesting that an objection to Petitioner's sentence based on *Apprendi* would have resulted in a change in the sentence.

Based on the above, the petition is denied. Service of this Order is ordered upon (1) the San Diego Office of the District Attorney, Appellate Division and (2) Petitioner.

IT IS SO ORDERED.

DATED: 7-16-07

KERRY WELLS
JUDGE OF THE SUPERIOR COURT

I hereby certify that the foregoing instrument is a full, true & correct copy of the original on file in this office, that said document has not been revoked, annulled or set aside, and it is in full force and effect.

Attest: JUL 16 2007 at 4:00 pm
Clerk of the Superior Court of the State of California, in and for the County of San Diego

By [signature] Deputy

writ of certiorari in the United States Supreme Court.

| | |
|---|---|
| **SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO**<br>☒ COUNTY COURTHOUSE, 220 W. BROADWAY, SAN DIEGO, CA 92101-3814<br>☐ HALL OF JUSTICE, 330 W. BROADWAY, SAN DIEGO, CA 92101-3827<br>☐ FAMILY COURT, 1501 6TH AVE., SAN DIEGO, CA 92101-3296<br>☐ MADGE BRADLEY BLDG., 1409 4TH AVE., SAN DIEGO, CA 92101-3105<br>☐ KEARNY MESA BRANCH, 8950 CLAIREMONT MESA BLVD., SAN DIEGO, CA 92123-1187<br>☐ NORTH COUNTY DIVISION, 325 S. MELROSE DR., VISTA, CA 92083-6643<br>☐ EAST COUNTY DIVISION, 250 E. MAIN ST., EL CAJON, CA 92020-3941<br>☐ RAMONA BRANCH, 1428 MONTECITO RD., RAMONA, CA 92065-5200<br>☐ SOUTH COUNTY DIVISION, 500 3RD AVE., CHULA VISTA, CA 91910-5649<br>☐ JUVENILE COURT, 2851 MEADOW LARK DR., SAN DIEGO, CA 92123-2792<br>☐ JUVENILE COURT, 1701 MISSION AVE., OCEANSIDE, CA 92054-7102 | *FOR COURT USE ONLY*<br>**FILED**<br>San Diego Superior Court<br>JUL 16 2007<br>Clerk of the Superior Court<br>By M. Castorena |
| PLAINTIFF(S)/PETITIONER(S)<br>The People of The State of California | |
| DEFENDANT(S)/RESPONDENT(S)<br>EDWARD G. ARBERRY | JUDGE:<br>DEPT: |
| **CLERK'S CERTIFICATE OF SERVICE BY MAIL**<br>**(CCP 1013a(4))** | CASE NUMBER<br>HC 18846 (2ND PETITION)<br>SCD 145070 |

I certify that: I am not a party to the above-entitled case; that on the date shown below, I served the following document(s):
ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS.

on the parties shown below by placing a true copy in a separate envelope, addressed as shown below; each envelope was then sealed and, with postage thereon fully prepaid, deposited in the United States Postal Service at: ☒ San Diego ☐ Vista ☐ El Cajon ☐ Chula Vista ☐ Oceanside ☐ Ramona, California.

| NAME | ADDRESS |
|---|---|
| EDWARD G. ARBERRY | CDC # E-77487<br>CALIFORNIA STATE PRISON - SOLANO<br>P.O. BOX 4000<br>VACAVILLE, CA 95696 |
| SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE<br>APPELLATE DIVISION | P.O. BOX 121011<br>SAN DIEGO, CA 92112-1011 |

**CLERK OF THE SUPERIOR COURT**

Date:7/16/2007 ______________ By M. Castorena ____MC____, Deputy

S156396

# IN THE SUPREME COURT OF CALIFORNIA

**En Banc**

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In re EDWARD G. ARBERRY on Habeas Corpus

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The petition for writ of habeas corpus is denied.

SUPREME COURT
FILED

MAR 1 9 2008

Frederick K. Ohlrich Clerk

_______________
Deputy

GEORGE
_______________
Chief Justice

# PROOF OF SERVICE BY MAIL

## BY PRISONER "IN PRO PER"

I hereby certify that I am over the age of 18 years of age, that I am representing myself, and that I am a prison inmate.

My prison address is: California State Prison - Solano
Housing: 14-D6-upper
P.O. Box 4000
Vacaville, California 95696-4000

On the "*date*" specified below, I served the following document(s) on the parties listed below by delivering them in an envelope to prison authorities for deposit in the United States Mail pursuant to the "Prison Mailbox Rule":

Case Name: ARBERRY vs. D.K. SISTO, Warden Case #: ______

Document(s) Served: Writ of habeas corpus, proof of service, and exhibits.

The envelope(s), with postage fully pre-paid or with a prison Trust Account Withdrawal Form attached pursuant to prison regulations, was/were addressed as follows:

CLERK OF THE COURT
FOURTH APPELLATE DISTRICT
750 B. St. #300
San Diego, California 92101-8189

JERRY BROWN, ATTORNEY GENERAL CALIFORNIA
STATE OF CALIFORNIA
110 W. "A" Street
San Diego, California 92101

I declare under penalty of perjury that the foregoing is true and correct. This declaration was executed on August 15th, 2007, in Vacaville, California.

"*date*"

Signature: Edward G. Arberry

Printed Name: Edward G. Arberry

# PROOF OF SERVICE BY MAIL

## BY PRISONER "IN PRO PER"

I hereby certify that I am over the age of 18 years of age, that I am representing myself, and that I am a prison inmate.

My prison address is: California State Prison - Solano
Housing: 14-D6-Upper
P.O. Box 4000
Vacaville, California 95696-4000

On the "*date*" specified below, I served the following document(s) on the parties listed below by delivering them in an envelope to prison authorities for deposit in the United States Mail pursuant to the "Prison Mailbox Rule":

**Case Name:** ARBERRY vs. SISTO, Warden **Case #:** ______________

**Document(s) Served:** Petition for Writ of habeas corpus, with exhibits.

The envelope(s), with postage fully pre-paid or with a prison Trust Account Withdrawal Form attached pursuant to prison regulations, was/were addressed as follows:

CLERK OF THE COURT
SUPREME COURT OF CALIFORNIA
350 McAllister St.
San Francisco, CA 94102-7303

ATTORNEY GENERAL'S OFFICE
CALIFORNIA DEPARTMENT OF JUSTICE
455 Golden Gate Ave, #11000
San Francisco,CA 94102-3664

I declare under penalty of perjury that the foregoing is true and correct. This declaration was executed on September 17 ,2007, in Vacaville, California.

"*date*"

Edward G. Arberrry

Signature: ______________________

Printed Name: Edward G. Arberry

# PROOF OF SERVICE BY MAIL

## BY PRISONER "IN PRO PER"

I hereby certify that I am over the age of 18 years of age, that I am representing myself, and that I am a prison inmate.

My prison address is: California State Prison - Solano
Housing: 14-D6-L
P.O. Box 4000
Vacaville, California 95696-4000

On the "*date*" specified below, I served the following document(s) on the parties listed below by delivering them in an envelope to prison authorities for deposit in the United States Mail pursuant to the "Prison Mailbox Rule":

Case Name: ARBERRY vs. SISTO, Warden Case #: ______

Document(s) Served: Writ of habeas corpus with exhibits. Proof of Service.

The envelope(s), with postage fully pre-paid or with a prison Trust Account Withdrawal Form attached pursuant to prison regulations, was/were addressed as follows:

CLERK OF THE COURT
U.S. DISTRICT COURT, Room 4290
880 Front Street,
San Diego, CA 92101-8900

I declare under penalty of perjury that the foregoing is true and correct. This declaration was executed on April 8th, 2008, in Vacaville, California.

"*date*"

Signature: Edward Arberry

Printed Name: Edward G. Arberry

JS44
(Rev. 07/89)

# CIVIL COVER SHEET

2254 ✓ 1983

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE SECOND PAGE OF THIS FORM.)

FILING FEE PAID
Yes ___ No ✓
IFP MOTION FILED
Yes ✓ No ___
COPIES SENT TO
Court ___ Pro Se ___

FILED
APR - 9 2008
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY ___ DEPUTY

I (a) PLAINTIFFS

**Edward G. Arberry**

DEFENDANTS

**Sisto, et al**

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF Solano
(EXCEPT IN U.S. PLAINTIFF CASES)

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND

(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)

**Edward G. Arberry**
**PO Box 4000**
**Vacaville, CA 95696**
**E-77487**

ATTORNEYS (IF KNOWN)

**'08 CV 0649 J POR**

II. BASIS OF JURISDICTION (PLACE AN x IN ONE BOX ONLY)

☐ 1 U.S. Government Plaintiff
☒ 3 Federal Question (U.S. Government Not a Party)
☐ 2 U.S. Government Defendant
☐ 4 Diversity (Indicate Citizenship of Parties in Item III

III. CITIZENSHIP OF PRINCIPAL PARTIES (PLACE AN X IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT
(For Diversity Cases Only)

| | PT | DEF | | PT | DEF |
|---|---|---|---|---|---|
| Citizen of This State | ☐1 | ☐1 | Incorporated or Principal Place of Business in This State | ☐4 | ☐4 |
| Citizen of Another State | ☐2 | ☐2 | Incorporated and Principal Place of Business in Another State | ☐5 | ☐5 |
| Citizen or Subject of a Foreign Country | ☐3 | ☐3 | Foreign Nation | ☐6 | ☐6 |

IV. CAUSE OF ACTION (CITE THE US CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE. DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY).

**28 U.S.C. 2254**

V. NATURE OF SUIT (PLACE AN X IN ONE BOX ONLY)

| CONTRACT | TORTS | | FORFEITURE/PENALTY | BANKRUPTCY | OTHER STATUTES |
|---|---|---|---|---|---|
| | PERSONAL INJURY | PERSONAL INJURY | | | |
| ☐ 110 Insurance | ☐ 310 Airplane | ☐ 362 Personal Injury-Medical Malpractice | ☐ 610 Agriculture | ☐ 422 Appeal 28 USC 158 | ☐ 400 State Reappointment |
| ☐ Marine | ☐ 315 Airplane Product Liability | ☐ 365 Personal Injury - Product Liability | ☐ 620 Other Food & Drug | ☐ 423 Withdrawal 28 USC 157 | ☐ 410 Antitrust |
| ☐ Miller Act | ☐ 320 Assault, Libel & Slander | ☐ 368 Asbestos Personal Injury Product Liability | ☐ 625 Drug Related Seizure of Property 21 USC881 | PROPERTY RIGHTS | ☐ 430 Banks and Banking |
| ☐ Negotiable Instrument | ☐ 330 Federal Employers' Liability | PERSONAL PROPERTY | ☐ 630 Liquor Laws | ☐ 820 Copyrights | ☐ 450 Commerce/ICC Rates/etc. |
| ☐ 150 Recovery of Overpayment &Enforcement of Judgment | ☐ 340 Marine | ☐ 370 Other Fraud | ☐ 640 RR & Truck | ☐ 830 Patent | ☐ 460 Deportation |
| ☐ 151 Medicare Act | ☐ 345 Marine Product Liability | ☐ 371 Truth in Lending | ☐ 650 Airline Regs | ☐ 840 Trademark | ☐ 470 Racketeer Influenced and Corrupt Organizations |
| ☐ 152 Recovery of Defaulted Student Loans (Excl. Veterans) | ☐ 350 Motor Vehicle | ☐ 380 Other Personal Property Damage | ☐ 660 Occupational Safety/Health | SOCIAL SECURITY | ☐ 810 Selective Service |
| ☐ 153Recovery of Overpayment of Veterans Benefits | ☐ 355 Motor Vehicle Product Liability | ☐ 385 Property Damage Product Liability | ☐ 690 Other | ☐ 861 HIA (13958) | ☐ 850 Securities/Commodities Exchange |
| ☐ 160 Stockholders Suits | ☐ 360 Other Personal Injury | | LABOR | ☐ 862 Black Lung (923) | ☐ 875 Customer Challenge 12 USC |
| ☐ Other Contract | | | ☐ 710Fair Labor Standards Act | ☐ 863 DIWC/DIWW (405(g)) | ☐ 891 Agricultural Acts |
| ☐ 195 Contract Product Liability | | | 720 Labor/Mgmt. Relations | ☐ 864 SSID Title XVI | ☐ 892 Economic Stabilization Act |
| | | | ☐ 730 Labor/Mgmt. Reporting & Disclosure Act | ☐ 865 RSI (405(g)) | ☐ 893 Environmental Matters |
| | | | ☐ 740 Railway Labor Act | FEDERAL TAX SUITS | ☐ 894 Energy Allocation Act |
| | | | ☐ 790 Other Labor Litigation | ☐ 870 Taxes (U.S. Plaintiff or Defendant) | ☐ 895 Freedom of Information Act |
| | | | ☐ 791 Empl. Ret. Inc. | ☐ 871 IRS - Third Party 26 USC 7609 | ☐ 900 Appeal of Fee Determination Under Equal Access to Justice |
| | | | ☐ Security Act | | ☐ 950 Constitutionality of State |
| | | | | | ☐ 890 Other Statutory Actions |

| REAL PROPERTY | CIVIL RIGHTS | PRISONER PETITIONS |
|---|---|---|
| ☐ 210 Land Condemnation | ☐ 441 Voting | ☐ 510 Motions to Vacate Sentence Habeas Corpus |
| ☐ 220 Foreclosure | ☐ 442 Employment | ☒ 530 General |
| ☐ 230 Rent Lease & Ejectmant | ☐ 443 Housing/Accommodations | ☐ 535 Death Penalty |
| ☐ 240 Tort to Land | ☐ 444 Welfare | ☐ 540 Mandamus & Other |
| ☐ 245 Tort Product Liability | ☐ 440 Other Civil Rights | ☐ 550 Civil Rights |
| ☐ 290 All Other Real Property | | |

VI. ORIGIN (PLACE AN X IN ONE BOX ONLY)

☒ 1 Original Proceeding ☐ 2 Removal from State Court ☐ 3 Remanded from Appelate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

VII. REQUESTED IN COMPLAINT: ☐ CHECK IF THIS IS A CLASS ACTION UNDER f.r.c.p. 23 DEMAND $ Check YES only if demanded in complaint: JURY DEMAND: ☐ YES ☐ NO

VIII. RELATED CASE(S) IF ANY (See Instructions): JUDGE Docket Number

DATE 4/9/2008 ~~SIGNATURE OF ATTORNEY OF RECORD~~

R. Mulley